

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-2196

United States of America,

Appellee,

v.

Elmer Duran-Varela,

Appellant.

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Appeal from the United States
District Court for the
District of Nebraska.

[UNPUBLISHED]

Submitted: October 2, 2001

Filed: October 2, 2001

Before LOKEN, FAGG, and MURPHY, Circuit Judges.

PER CURIAM.

Elmer Duran-Varela pleaded guilty to illegal reentry following deportation after conviction for an aggravated felony, in violation of 8 U.S.C. § 1326(a), and the district court¹ sentenced him to 41 months imprisonment and 3 years supervised release. On appeal, counsel moved to withdraw under Anders v. California, 386 U.S. 738 (1967), and filed a brief arguing that Duran-Varela should have received a downward departure because his previous aggravated felony conviction for aggravated battery was not serious.

¹The HONORABLE RICHARD G. KOPF, Chief Judge, United States District Court for the District of Nebraska.

The district court's decision was clearly an exercise of discretion not to depart under the circumstances in this case. The court's decision is therefore unreviewable. See United States v. Orozco-Rodriguez, 220 F.3d 940, 942 (8th Cir. 2000).

Moreover, following our independent review, see Penson v. Ohio, 488 U.S. 75 (1988), we find no nonfrivolous issues. Accordingly, we affirm and grant counsel's motion to withdraw.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.